United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 11-345**
	)	**Issued: December 2, 2011**
DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Springfield, VA, Employer	)	

Appearances:
Paul A. Smith, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 26, 2010 appellant, through his representative, filed a timely appeal of the August 6, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which found that he did not sustain an injury in the performance of duty on January 29, 2009. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on January 29, 2009.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 23, 2009 appellant, then a 41-year-old criminal investigator, filed a traumatic injury claim alleging that at 8:00 a.m. on January 29, 2009 he sustained multiple fractures of the right humerus bone when he slipped and fell on ice in the performance of duty. He indicated that he was off-premises preparing an official government vehicle to go to work which had frozen doors due to overnight freezing. Appellant stopped work that same day. His supervisor indicated that appellant's fixed hours were 8:30 a.m. to 5:00 p.m.

In a January 29, 2009 work excuse note, Dr. Andrew Willis, a Board-certified orthopedic surgeon, restricted appellant from working until further notice. In a February 27, 2009 Authorization for Examination and/or Treatment Form (CA-16), he reported that appellant slipped and fell on ice in his driveway and diagnosed right proximal humerus fracture. Dr. Willis opined that appellant's condition was not caused or aggravated by his federal employment. He released him to light-duty work with restrictions on February 17, 2009.

Appellant submitted a series of physical therapy prescriptions dated February 10, 17 and April 13, 2009 and an April 13, 2009 work excuse slip.

On May 4, 2009 OWCP advised appellant that the evidence submitted was not sufficient to establish that he was injured while in the performance of duty and allotted 30 days for appellant to submit additional evidence and respond to its inquiries.

In a May 11, 2009 narrative statement, appellant stated that he returned home from an assignment in an official government vehicle, which he had authorization for home to work utilization, on January 27, 2009. On January 28, 2009 there was an overnight winter storm consisting of a wintry mix of snow, sleet and rain and as a result he opted to take leave under a liberal leave policy. On January 29, 2009 appellant prepared to return to duty and slipped and fell on ice while attempting to brush off snow and ice and un-stick frozen doors. He fractured his right arm and was fitted with a compression cast and arm sling. Appellant was contacted by the employing establishment who asked if he had authorization for home to work use of the vehicle and was then instructed to fill out a claim form since he was injured while preparing the vehicle for duty and had proper authorization for home to work use.

In a May 26, 2009 Authorization for Examination and/or Treatment Form (CA-16), Dr. Willis reiterated his diagnosis of right humerus fracture. He opined that he believed the condition was caused or aggravated by the employment incident and that appellant was totally disabled from January 29 to February 17, 2009 and totally disabled from February 17 to May 26, 2009. Dr. Willis released appellant to regular-duty work on May 26, 2009.

In a series of medical and radiological reports for the period January 29 to April 13, 2009, Dr. Willis reiterated his diagnosis of right shoulder proximal humerus fracture and recommended physical therapy. He released appellant to light-duty work on March 10, 2009.

Appellant submitted a May 13, 2009 physical therapy prescription and certifications for limited home-to-work utilization of official government vehicle for the period October 1, 2008 to March 25, 2009.

By decision dated June 8, 2009, OWCP denied appellant's claim, finding that he was not in the performance of duty when injured.

On May 27, 2010 appellant's representative requested reconsideration, arguing that appellant was performing required vehicle maintenance by cleaning off snow before entering the vehicle when he slipped and fell on January 29, 2009, which placed him in the performance of duty. In a June 11, 2009 narrative statement, appellant argued that he was in the performance of duty as he was responsible for all maintenance of the vehicle and considered clearing snow and ice from the vehicle to safely drive to work part of his responsibility. He submitted a July 1, 2006 Official Government Vehicle Preventative Maintenance Schedule which established rules and procedures for the maintenance and repair of employing establishment vehicles and a What a Federal Employee Should Do When Injured at Work (Form CA-10). Appellant resubmitted a May 11, 2009 narrative statement, medical reports by Dr. Willis for the period January 29 to April 13, 2009, certifications for official government vehicle utilization for the period October 1, 2008 to March 25, 2009, an April 13, 2009 physical therapy prescription, and Authorization for Examination and/or Treatment CA-16 forms dated February 29 and May 26, 2009.

In an August 6, 2010 decision, OWCP denied modification of the June 8, 2009 decision. It noted that injuries arising out of general maintenance of the vehicle are not covered under FECA and as appellant had not entered the vehicle and was not traveling between home and work as his utilization allowed, he was not performing actual duties and his injury was not in the course of his employment.

LEGAL PRECEDENT

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee/employer relationship. Instead, Congress provided for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[2] The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment. In addressing this issue, the Board has stated: In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[3] In deciding whether an injury is covered by FECA,[4] the test is whether,

[2] 5 U.S.C. § 8102(a). *See also Angel R. Garcia*, 52 ECAB 137 (2000).

[3] *See George E. Franks*, 52 ECAB 474 (2001).

[4] 5 U.S.C. §§ 8101-8193.

under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[5]

The Board has also recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Rather such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[6] Due primarily to the myriad of factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of travel may fairly be considered a hazard of employment. Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts to each claim: (1) where the employment requires the employee to travel; (2) where the employer contracts for and furnishes transportation to and from work; (3) where the employee is subject to emergency duty, as in the case of firefighters; (4) where the employee uses the highway or public transportation to do something incidental to his or her employment with the knowledge and approval of the employer; and (5) where the employee is required to travel during a curfew established by local, municipal, county or state authorities because of civil disturbances or other reasons.[7] OWCP's procedure manual further indicates:

> "Where the Employment Requires the Employee to Travel. This situation will not occur in the case of an employee having a fixed place of employment unless on an errand or special mission. It usually involves an employee who performs all or most of the work away from the industrial premises, such as a chauffeur, truck driver or messenger. In cases of this type, the official superior should be requested to submit a supplemental statement fully describing the employee's assigned duties and showing how and in what manner the work required the employee to travel, whether on the highway or by public transportation. In injury cases a similar statement should be obtained from the injured employee."[8]

ANALYSIS

The Board finds that appellant did not sustain an injury in the performance of duty on January 29, 2009.

Appellant was not injured on the employing establishment premises. Rather, he was injured on the driveway at his residence while he was preparing his vehicle prior to leaving for work. At the time of his injury, appellant had fixed hours and place of work, and had not yet reported to work at the time of injury. As noted, the general coming and going rule would preclude coverage under FECA for this injury. However, because appellant was assigned a

[5] *See Mark Love*, 52 ECAB 490 (2001).

[6] *See Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

[7] *See Melvin Silver*, 45 ECAB 677 (1994); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(a) (March 2011).

[8] *See* Federal (FECA) Procedure Manual, *id.* at Chapter 2.804.6(b).

government vehicle, which is a benefit to the employer, he may be deemed to be in the performance of his duties.[9] Nevertheless, the Board finds that he was not injured in the performance of duty as he did not fall within any of the exceptions to the general coming and going rule.

In the present case, appellant was cleaning a government-issued vehicle in order to leave for work at the time of his injury. He argued that his act of removing snow and ice and defrosting the frozen doors constituted required maintenance of the government vehicle. The Board notes that the July 1, 2006 Official Government Vehicle Preventative Maintenance Schedule did not specifically mention general maintenance, such as clearing off snow and ice. The Board has held that the mere fact that the employing establishment provided the vehicle does not, in and of itself, establish an exception to the coming and going rule.[10] The Board finds that the record does not establish that appellant falls within any of the exceptions set forth above. At the time of the incident, appellant was not driving the government-owned vehicle to either travel to work or to an assignment, he was not engaged in any activities incidental to his employment, he was not required to travel during a curfew imposed by a government or municipality, he was not subject to emergency duty and he was not engaged in a special errand or mission at the request of his supervisors.[11] The act of leaving one's residence to get to work is an activity in which all employees participate.[12] There is a presumption that the trip to work of an employee with fixed hours and place of work is no different from that of any other employee with fixed hours and place of work. Appellant's injury was an ordinary, nonemployment hazard of the journey to work itself, which is shared by all travelers. Therefore, the Board finds that he did not sustain an injury in the performance of duty.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[9] *See Gabe Brooks*, 51 ECAB 184 (1999) (where the Board notes that an "off-premises worker" injured while en route between work and home while driving a government vehicle is generally provided protection under FECA).

[10] *See Charles J. Soltys*, Docket No. 05-1630 (issued February 17, 2006).

[11] Larson defines "special errand" as follows: "When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently sustained to be viewed as an integral part of the service itself." A. Larson, *The Law of Workers' Compensation* § 16.11 (November 2000).

[12] *See Kathryn A. Tuel-Gillem*, 52 ECAB 451 (2001) (where claimant, a rural carrier, fractured her ankle when she slipped on ice in her driveway while walking to her private vehicle, the Board found that she had not sustained an injury in the performance of duty). *See also G.F.*, Docket No. 08-1041 (issued September 16, 2008) (where claimant, a rural carrier, slipped and fell while he was salting and sanding ice on his driveway so that he could drive his private vehicle to work, the Board found that it fell within the general rule relating to off-premises injuries and he had not sustained an injury in the performance of duty).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on January 29, 2009.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board